was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceedings or postpone the inquiry it was expressly conferred upon him, see for example rules 7, 8 and 19.

(3) If there is more than one election petition relating to the same election or return, they are to be dealt with as one (rule 6). It would be manifestly inconvenient and against the public interest if by late service in one case and subsequent delay in those proceedings the hearing of other petitions could be held up.

(4) Respondents may deliver recriminatory cases (rule 8) and speedy service, in order that the respondent may know the case against him, is obviously desirable so that he may collect his evidence as soon as possible.

With regard to the authorities, for the reasons given in (2) above many of them such as *In re Pritchard* [8] do not assist the determination of this case.

The case of *Williams* v. *Mayor of Tenby and Others* [9] which has stood the test of nearly 90 years and seems to their Lordships plainly rightly decided, strongly supports the view that the provisions of rule 15 were mandatory.

On the whole matter their Lordships have reached the conclusion that the provisions of rule 15 are mandatory, and the petitioner's failure to observe the time for service thereby prescribed rendered the proceedings a nullity.

With all respect to the Federal Court their Lordships cannot attribute weight to the circumstance that the rules contained no express power to strike out a petition for non-compliance with rule 15.

When there is a withdrawal by a party it is obviously desirable that the rules should make provision for such an event and that it should receive due publicity by publication in the *Gazette* but, if the proceedings never begin in any real sense by reason of the failure to serve the petition, there seems no compelling reason for any formal order. The Election Judge must, however, have an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the Rules.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the appeal should be allowed and the petition of the respondent dismissed and that the respondent should pay the appellant's costs of this appeal and in the courts below.

Appeal allowed.

Solicitors: *Coward, Chance & Co.; Garber, Vowles & Co.*

NORATA SINGH v. SERDARA SINGH

[F.C. (Tan Ah Tah F.J., Buttrose and Winslow JJ.) January 20, 1967]

[Singapore — Federal Court Civil Appeal No. Y6 of 1966]

Practice and Procedure — Appeal — Principle on which the appellate court may interfere with lower court's findings of fact — Trial judge accepting plaintiff's evidence and rejecting the evidence of the defendant and his witness's evidence — No ground for setting aside decision based on credibility.

In this action the plaintiff/respondent, a moneylender, claimed the sum of $6,385.91 from the defendant/appellant, also a moneylender, being principal and interest due under a promissory note dated the 2nd July, 1964, whereby the defendant agreed to pay the plaintiff on demand $6,000 being money lent by the plaintiff to the defendant on that date and interest thereon at 18 per centum per annum until payment. There was a sharp conflict of evidence as to the facts. The plaintiff's case was that the sum of $6,000 was actually lent by him to the defendant while the defendant's case was that a sum of only $2,000 was in fact lent. After carefully considering the matter the learned trial judge came to the conclusion that the plaintiff's version of the incident was true and the defendant's false. He accordingly gave judgment in favour of the plaintiff. It is from that judgment that the defendant appealed.

Held: (1) before the appellate court can reject the learned trial judge's estimate of credibility of the witnesses it must be satisfied that his view was plainly wrong and that any advantage he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion;

(2) once the learned trial judge arrived at the conclusion that the plaintiff was speaking the truth and the defendant and his witnesses were lying and expressly said so in his judgment there is nothing more left to say.

Cases referred to:—

(1) *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87.

(2) *Thomas* v. *Thomas* [1947] A.C. 484, 487.

(3) *Clarke* v. *Edinburgh & District Tramways Co. Ltd.* [1919] S.C. (H.L.) 35.

(4) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

FEDERAL COURT.

J. B. Jeyaretnam for the appellant.

P. Coomaraswamy (*S. K. Chan* with him) for the respondent.

Cur. Adv. Vult.

Buttrose J.: In this action the plaintiff, a moneylender, claimed the sum of $6,385.91 from the defendant, also a moneylender, being principal and interest due under a promissory note dated the 2nd July, 1964, whereby the defendant agreed to pay the plaintiff on demand $6,000 being money lent by the plaintiff to the defendant on that date and interest thereon at 18 per centum per annum until payment.

There was a sharp conflict of evidence as to the facts.

The plaintiff's case was that the sum of $6,000 was actually lent by him to the defendant while the defendant's case that a sum of only $2,000 was in fact lent.

The evidence as to the details surrounding these two conflicting versions is fully set out in the judgment of the learned trial judge and it is unnecessary, nor do we propose, to restate it.

After carefully considering the matter he came to the conclusion that the plaintiff's version of the incident was true and the defendant's false. He accordingly gave judgment in favour of the plaintiff. It is from that judgment that the defendant now appeals.

It was conceded by counsel for the defendant that the appeal turned almost in its entirety on questions of fact.

It behoves us, therefore, at the outset to ascertain what the trial judge thought of the evidence and what were his findings in relation to it.

This is what he had to say on the matter:—

'I considered very carefully the evidence that was before me and I found that the plaintiff was a witness of truth. Furthermore his story was supported by his books and his bank statements. On the other hand, the demeanour of the defendant in the witness box convinced me that he was not speaking the truth. It is true that Thaman Singh supported the defendant's story that $2,000 was handed over but I was not impressed by this witness who I was sure was not speaking the truth. It is unbelievable that the defendant, a moneylender himself, should have signed a promissory note for $6,000 when he actually received only $2,000. What did he say on this point? His evidence was this:

"When I asked him for the loan of $2,000 the plaintiff said he would lend me the money but he wanted me to sign for $6,000 and when that $2,000 was repaid he would return the promissory note for $6,000. I was surprised at his condition. I told him I was from the same community and I wanted only $2,000 and I would sign for that amount and that it would not be right to ask me to sign for more.

I eventually signed a promissory note for $6,000. I signed it as I was in need of money and he assured me that there would be no dishonesty about it; he said as soon as I paid $2,000 he would return the promissory note to me."

The probabilities are the transaction as described by the defendant did not take place.'

Now it is well established law that before a trial judge's findings of fact can be disturbed they must be shown to be plainly wrong. The authorities on this well-worn subject are numerous and clear.

A recent Privy Council decision on the subject and perhaps one most appropriate to the present case is *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.*[1] where at p. 92 Lord Guest deals with the matter in this way:—

'There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas* v. *Thomas* [2] at page 487:

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

'Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke* v. *Edinburgh & District Tramways Co. Ltd.*:[3]

"In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."'

Before therefore we are entitled to reject the learned trial judge's estimate of the credibility of the witnesses we must be satisfied that his view was plainly wrong and that any advantage he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

A number of matters were urged upon us on behalf of the defendant as showing that the trial judge erred in his findings. It was argued that he erred in fact:—

1. in his finding that Ram Singh was better known to the defendant than to the plaintiff;
2. in his finding that the plaintiff was a witness of truth; and
3. in his finding that the plaintiff's story was supported by his books and his bank statements.

We have examined the evidence on these matters and find ourselves quite unable to say that the learned trial judge was clearly wrong in coming to the conclusion which he did.

Again it was urged upon us that the trial judge erred in law in failing to give proper weight and consideration to the contradictions

in the plaintiff's own evidence and between his evidence and that of his witness and to the plaintiff's avoidance of questions put to him in cross-examination and to his evasive replies.

It was further submitted that the trial judge erred in law in rejecting the evidence of the defendant on the issue of whether $6,000 or $2,000 was lent because the demeanour of the defendant in the witness box convinced him that he was not speaking the truth and in rejecting the evidence of Thaman Singh who was not impeached in cross-examination without giving reasons for so doing.

In our view there is no substance in any of the points raised. They all relate to matters entirely within the trial judge's discretion, a discretion which he exercised after having had the advantage of seeing the witnesses and hearing their evidence and with which we are unable to see any reason for interfering. So far from being satisfied that the trial judge's views were plainly wrong we have come to the conclusion that they were probably right.

For reasons best known to themselves neither counsel saw fit to address the court at the conclusion of the hearing in the court below. The trial judge's note on the matter reads as follows:—

"Jeyaretnam:" — (who represented the defendant in the lower court and before us) —

"Largely a question of fact. My learned friend says he does not wish to address the court, in that case I do not wish to address the court."

Whether a thorough and exhaustive review of the evidence by counsel for the defendant would have been of any assistance to the learned trial judge is a matter on which we do not feel disposed to speculate. The fact remains that this was not done and counsel cannot be heard to complain that matters he now considers of importance were not specifically dealt with by the learned trial judge in his judgment.

Reliance was placed by counsel for the defendant on the well-known case of *Benmax* v. *Austin Motor Co. Ltd.*,[4] as authority for the proposition that an appellate court is in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion, though it will give weight to the opinion of the trial judge. We have no quarrel with that statement as far as it goes but it only applies where the sole question is the proper inference to be drawn from specific facts and not where there is any question, as here, of the credibility of witnesses.

For that reason the principles enunciated in *Benmax's case* have no application to the present one.

It seems to us that once the learned trial judge arrived at the conclusion that the plaintiff was speaking the truth and that the defendant and his witness Thaman Singh were lying and has expressly said so in his judgment there is really nothing more left to say.

It was also argued on behalf of the defendant that the trial judge erred in law in accepting the evidence of the plaintiff because it was unbelievable that the defendant, a moneylender himself, should have signed a promissory note for $6,000 when he actually received only $2,000. All the trial judge was saying was that on the inherent probabilities of the matter he disbelieved the defendant.

Finally certain arguments were addressed to us on behalf of the defendant as tending to show that the learned trial judge had failed to appreciate the onus or burden of proof which lay upon the plaintiff but they are in our view entirely without substance.

In the result therefore the appeal fails on all points and must be dismissed with costs.

Tan Ah Tah F.J. and **Winslow J.** concurred.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Braddell Bros.*

LIM PHOE TOE v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) January 21, 1967]

[Penang — Criminal Appeal No. 1 of 1967]

Criminal Law and Procedure — Binding over complainant — Order for binding over must be based on positive evidence that complainant is likely to commit a breach of the peace — Criminal Procedure Code (Cap. 21), s. 74(1).

In this case the appellant made a complaint against one *K* and the case was heard in the magistrate's court. *K* did not give evidence on oath but merely made a statement from the floor of the court. At the end of the case the magistrate bound over the appellant under section 74(1) of the Criminal Procedure Code.

Held: (1) the power of a magistrate to bind over a complainant should be sparingly and carefully used; and the order must be based on positive evidence that complainant is likely to commit a breach of the peace;

(2) in this case as there was no evidence to justify the course of action taken by the magistrate the order binding over the complainant must be quashed.

Cases referred to:—

(1) *Ip Ying Wah* v. *Public Prosecutor* [1958] M.L.J. 34.

(2) *Mek binte Awang* v. *Che Mas binte Awang* [1948] M.L.J. 36.

(3) *Ariffin Mohamed Ariff* v. *R.* [1955] M.L.J. 211.

MAGISTRATE'S CRIMINAL APPEAL.

Goh Eng Kee for the appellant.

Tuan Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the respondent.